SELVAM HOLDINGS (MALAYSIA) SDN BHD

v.

GRANT KENYON & ECKHARDT SDN BHD; BSN COMMERCIAL BANK MALAYSIA BHD & ORS (INTERVENORS)

HIGH COURT MALAYA, KUALA LUMPUR
VINCENT NG J
[ORIGINATING SUMMONS NO: D1-24-56-1993]
13 SEPTEMBER 2002

CIVIL PROCEDURE: *Costs - Bill of costs - Appeal - Whether appeal procedure not provided by Rules - Appeal to judge in chambers against taxation proceedings - Whether improper - Whether to apply for review of items in bill of costs as taxed - Rules of High Court 1980, O. 59 rr. 34(1), 35(1), 36(1) & (4)*

By an order dated 7 November 1997 ('the Order') the High Court allowed the intervenors' application to intervene in this action and ordered that costs thereof be taxed and paid forthwith by the appellant's director and/or solicitors. The appellant appealed to the Court of Appeal against the Order, but was unsuccessful in both the appeal and the application for leave to appeal further to the apex court. Following that, on 19 November 2001, the learned senior assistant registrar ('SAR') heard the taxation and allowed the intervenors taxed cost of RM66,344.50. Dissatisfied, the plaintiff appealed to the judge in chambers against the SAR's decision, arguing that the SAR had no jurisdiction to hear the taxation proceedings, that the intervenors had no locus to apply for taxation, and that both the High Court and the Court of Appeal were wrong in respectively granting and affirming the Order. The intervenors retorted that some of the issues raised by the appellant were issues that had already been adjudicated upon, and therefore barred by *res judicata*, whilst others constituted new issues that had never been raised before the SAR. This apart, the intervenors also contended that the notice of appeal had contravened O. 59 rr. 34(1) and 36(1) Rules of High Court 1980 ('RHC'), as the rules did not provide for any appeal against the SAR's decision per se, but mandated the appellant to first apply to the SAR for a review of the item taxed before seeking for another review before the judge in chambers. The main issue that arose was whether, upon the arguments as put forth by the intervenors, the appeal herein ought to be dismissed.

Held:

[1] The appellant is trying in an oblique fashion to re-canvass the issue as to whether 'Selvam Holdings (Malaysia) Sdn Bhd' and 'Selvam Holdings (M) Sdn Bhd' refer to one and the same entity. Clearly this issue had been settled with curial finality by the Court of Appeal, wherein the Order was confirmed in toto. This issue was therefore *res judicata* and it would be an abuse of process for the appellant to be allowed to re-open the same. (p 469 c-f)

[2] It is highly contemptuous of counsel for the appellant to have thought it fit to nonchalantly let fall from his mouth the following outrageous words, namely: "They have no locus because Selventhiranathan J's judgment dated 7 November 1997 was wrong. There was an appeal against the order but the Court of Appeal wrongly interpreted the factual matrix in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd*". It is surprising that such words could issue forth from his mouth when he full well knew that it was not open to the appellant to question the endorsement of the order of his Lordship Dato' Abdul Aziz J by the Court of Appeal, when the application to the Federal Court for leave was turned down, thereby rendering absolute finality to the entire proceedings. (p 470 a-c)

[3] There is no provision in the RHC for lodgment of appeals to the judge in chambers against the taxation *per se*. What is allowed is for an aggrieved party to apply for a review of certain items or part of an item in the bill of costs taxed by the registrar. This must be so as the taxation stage of any civil proceedings presupposes the legitimacy and integrity of the judgment or order pertaining to the merits of the entire case adjudicated. In the instant case, there clearly was no application to the SAR under O. 59 r. 34(1) RHC for a review of her decision, which is a precondition to the filing of a review of items in the taxation under O. 59 r. 36 before this court. (p 471 b-c)

[4] The appellant's procedural approach to this court is couched as an appeal rather than an application under O. 59 r. 36(1) RHC. However, since there is no provision in the RHC for an appeal against taxation proceedings, and since the appellant did not raise the issue of 'locus' before the SAR, the appeal herein is in effect an application for review under the said r. 36(1) but bereft of any item or items sought for review. It is thus an attempt by the appellant to 'knock-off', through the back door, not one but all the items taxed by nullifying the whole process of taxation. (p 471 d-e)

[Appeal dismissed.]

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 ***(foll)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 ***(refd)***

Lim Soh & Ors v. Allen & Gledhill [2001] 3 CLJ 233 ***(refd)***

Selvam Holdings (Malaysia) Sdn Bhd v. Grant Kenyon & Eckhardt Sdn Bhd, BSN Commercial Bank Malaysia Bhd & Ors (Intervenors) [2000] 3 CLJ 16 ***(refd)***

Selvam Holdings (Malaysia) Sdn Bhd v. Toby Lam as the Receiver and Manager and Liquidator of Selvam Holdings (M) Sdn Bhd & Anor [1994] 4 CLJ 899 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 59 rr. 34(1), 35(1), 36(1)

For the appellant/plaintiff - K Periasamy; M/s Periasamy K
For the 1st respondents & 2nd intervenors - Harjit Singh; M/s Gill & Tang

Reported by WA Sharif

JUDGMENT

Preamble

The 1st and 2nd intervenors filed a bill of cost (encl. 60) against Jean Louis Jeyaraj ('JLJ') pursuant to a High Court order dated 7 November 1997 (7 November 1997 order).

When the case came up for taxation of the bill of cost on 8 November 2001 before the learned senior assistant registrar (SAR), the counsel for JLJ asked for an adjournment on the grounds that JLJ intends to file an application to set aside the court order dated 7 November 1997. Counsel for the intervenors objected and informed the learned SAR that Selvam Holdings (Malaysia) Sdn Bhd's (plaintiff) appeal to the Court of Appeal against 7 November 1997 order was dismissed with costs and leave to the Federal Court was also dismissed with costs.

The taxation of the bill of costs went on and the learned SAR delivered her decision on 19 November 2001 allowing a taxed cost of RM66.344.50 inclusive of allocatur to the 1st and 2nd intervenors (the 'intervenors').

This resulted in JLJ ('appellant') filing a notice of appeal to the judge in chambers (encl. 61) against the decision of the learned SAR. When encl. 61 came up for hearing on 12 March 2002 the counsel for the appellant raised a new issue (which was not canvassed before the SAR), namely, whether the intervenors had locus to seek the taxation for costs pursuant to the court order dated 7 November 1997 when same was not complied with – worthy of note is that the quantum of taxed cost was not in dispute.

This is how the appellant had put her case before me. Selvam Holdings (Malaysia) Sdn Bhd is a company incorporated and registered in Malaysia under the Companies Act 1965 on 17 December 1971. Whereas, Selvam Holdings (M) Sdn Bhd is a non-existent entity. On 19 November 1979 ('19 November 1979 order') a winding-up order was made *vide* Petition No. 34-1979 against Selvam Holdings (M) Sdn Bhd on the application by Grant Kenyon & Eckhardt Sdn Bhd (defendant), but 19 November 1979 order was set aside on by an order of court dated 15 April 1993 ('15 April 1993 order') in the following terms.

(i) that the winding-up order dated 19 November 1979 against Selvam Holdings (M) Sdn Bhd is null and void;

(ii) that the said winding-up order does not bind Selvam Holdings (Malaysia) Sdn Bhd; and

(iii) hence, Selvam Holdings (Malaysia) Sdn Bhd has not been wound-up.

However, it is common ground that 15 April 1993 order was on 7 November 1997 set aside (by 7 November 1997 order) in the following terms, that:

(a) the intervenors be allowed leave to intervene in this action and be added as defendants to the suit;

(b) cause papers be amended accordingly to reflect (a);

(c) the order of court dated 15 April 1993 be set aside;

(d) that the costs of and incidental to the applications herein be taxed and paid forthwith by Jean Louis Jeyaraj Selvam and/or K. Jaya Simbun & Associates. (Be it be noted that Jean Louis Jeyaraj Selvam was a director of Selvam Holdings (Malaysia) Sdn Bhd and Messrs K. Jaya Simbun & Associates were the then solicitors for JLJ.)

It has never been controverted that 7 November 1997 order including order (d) above was upheld by the Court of Appeal on 10 March 2000 (see *Selvam Holdings (Malaysia) Sdn Bhd v. Grant Kenyon & Eckhardt Sdn Bhd, BSN Commercial Bank Malaysia Bhd and Ors (Intervenors)* [2000] 3 CLJ 16). It is also a fact that Selvam Holdings (Malaysia) Sdn Bhd's (plaintiff) application for leave to appeal to the Federal Court was dismissed with costs on 3 July 2000. The argument put forward by the appellant's (JLJ) solicitors is that the learned SAR had no jurisdiction to hear the taxation proceedings as the peremptory order of the court dated 7 November 1997 was not complied with. And that, in view of the non-compliance of the court order dated 7 November 1997, the court order dated 15 April 1993 remains valid – the case of *Lim Soh & Ors v. Allen & Gledhill* [2001] 3 CLJ 233 was cited in support. It is material here to note that this issue was also not canvassed by the appellant in the Court of Appeal.

In his written submission learned counsel for the appellant also ventured an opinion that the Court of Appeal in *Selvam Holdings (Malaysia) Sdn Bhd v. Grant Kenyon & Eckhardt Sdn Bhd & Ors (supra)* had wrongly interpreted the factual matrix in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75, a Federal Court judgment. He was also of the view that the judgment of his Lordship Abdul Aziz JC (as he then was) in *Selvam Holdings (Malaysia) Sdn Bhd v. Toby Lam as the Receiver and Manager and Liquidator of Selvam Holdings (M) Sdn Bhd & Anor* [1994] 4 CLJ 899 should not have been accepted and endorsed by the Court of Appeal.

After having carefully studied the written submission of counsel for the appellant I am left with the view that the appellant is trying in an oblique fashion to, in effect, recanvass the issue as to whether 'Selvam Holdings (Malaysia) Sdn Bhd' and 'Selvam Holdings (M) Sdn Bhd' refer to one and the same entity. Clearly, this issue was settled with curial finality by the Court of Appeal as aforesaid, wherein the said decision of 7 November 1997 was confirmed in toto.

Surely, in my judgment the intervenors cannot be subjected to endless attempts by the appellant to reopen the same issues which have already been dealt with by a court of competent jurisdiction – and a *fortiori* by another court of higher jurisdiction. This principle was expounded in the case of *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783, a Supreme Court decision, at p. 791:

> What is *res judicata*? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel *per rem judicatum*. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur*.

It would be an abuse of the process of court for parties to be allowed to reopen the same issues over and over again. In his judgment delivered on 24 October 1994 in Originating Motion No. D6-25-42-92 his Lordship Dato' Abdul Aziz bin Mohamad J (as he then was) held that the name 'Selvam Holdings (Malaysia) Sdn Bhd' and 'Selvam Holdings (M) Sdn Bhd' refer to one and the same company and that the winding-up order dated 19 November 1979 was properly made and coupled with proper appointment of receivers and managers and liquidators. Besides there being no appeal filed against this order, the Court of Appeal had also held that there is a valid winding-up order against Selvam Holdings (Malaysia) Sdn Bhd. Indeed notably, in the appeal against 7 November 1997 order the Court of Appeal commented that "the appellant's behaviour was highly questionable and that of their solicitors most unprofessional". This conclusion drove the Court of Appeal to order costs to be borne by the appellant (JLJ) personally.

I am also of the view that it is highly contemptuous on the part of counsel for the appellant, Mr. K. Periasamy, to have thought it fit to nonchalantly let fall from his mouth the following outrageous words:

> They have no locus because Selventhiranathan J's judgment dated 7 November 97 was wrong. There was an appeal against the order but the Court of Appeal wrongly interpreted the factual matrix in *Badiaddin* ... as stated by me in page 10 of Lampiran 63B of my written submission, Selvam Holdings (M) which was ordered to be wound up is a non-existent company.

What surprised me is that such words could issue forth from his mouth when he full well knew that it was not open to the appellant to question the endorsement of the order of his Lordship Dato' Abdul Aziz J by the Court of Appeal, when the application to the Federal Court for leave was turned down – which rendered absolute finality to the entire proceedings.

My attention was also drawn by counsel for the intervenors to the fact that the notice of appeal to me (encl. 61) was filed in contravention of O. 59 r. 34(1) and r. 36(1) Rules of the High Court 1980 (RHC 1980). Rule 34(1), r. 35(1) and the pertaining rr. 36(1) and (4) provide as follows:

rule 34(1):

> (1) Any party to any taxation proceedings who is dissatisfied with the allowance or disallowance in whole or in part of any item by the Registrar, or with the amount allowed by the Registrar in respect of any item, **may apply to the Registrar to review** his decision in respect of that item.

rule 35(1):

> (1) On reviewing any decision in respect of any item, the Registrar may receive further evidence and may exercise all the powers which he might exercise on an original taxation in respect of that item, including the power to award costs of and incidental to the proceedings before him; and any costs awarded by him to any party may be taxed by him and may be added to or deducted from any other sum payable to or by that party in respect of costs.

rule 36(1) and (4):

> (1) Any party who is dissatisfied with the decision of the Registrar to allow or to disallow any item in whole or in part on review under rule 34 or 35, or with the amount allowed in respect of any item by the Registrar on any such review; **may apply to a Judge for an order to review the taxation as to that item or part of an item**, if but only if, one of the parties to the proceedings before the Registrar requested the Registrar in accordance with rule 35(3) to state the reasons for his decision in respect of that item or part on the review.

> (4) Unless the Judge otherwise directs, no further evidence shall be received on the hearing of an application under this rule, and no ground of objection shall be raised which was not raised on the review by the Registrar ...

In my view, there is (for obvious and logical reasons) no provision in the Rules of the High Court 1980 for lodgment of appeals to the judge in chambers against the taxation *per se* what is only allowed is for an aggrieved party to apply for review of certain items or part of an item in the bill of costs taxed by the registrar. This view is consistent with logic as the taxation stage of any civil proceeding presupposes the legitimacy and integrity of the judgment or order pertaining to the merits of the entire case adjudicated. It is common ground that there was no application to the learned SAR under O. 59 r. 34(1) RHC 1980 for review of her decision, which is a precondition to the filing of a review of items in the taxation under O. 59 r. 36 before me. I am entirely conscious of the fact that the appellant's procedural approach to me is couched as an appeal rather than an application under O. 59 r. 36(1). However, as, in my considered view there is no provision in the Rules of the High Court for an appeal against the taxation proceedings and for the further reason that the appellant did not at all raise the issue of 'locus' before the SAR, encl. 61 is in effect an application for review under r. 36(1) bereft of any item or items sought for review – clearly, an attempt by the back door (I may say) to 'knock off, not one, but all the items taxed bill by nullifying the whole process of taxation.

In the event, I dismissed the appeal in encl. 61 and awarded costs to the intervenors.

In Postlude

As soon as the appeal was dismissed counsel for the intervenors requested that this court order that costs on encl. 61 be borne by Mr. K. Periasamy personally, due to his contumacious and culpable conduct, as he was at all times aware of the earlier decisions and yet took it upon himself to represent JLJ who paid scant regard to or was contemptuous of the earlier court orders from various levels. In response, I suggested that should the appellant take this matter further, counsel for the intervenors could then quite justifiably pray for costs here and in the court above to be personally borne by the solicitors. As it promptly turned out, an appeal to the Court of Appeal against my decision here was indeed filed by Messrs Periasamy K.